



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

July 9, 1996

Ms. Lan P. Nguyen  
Assistant City Attorney  
City of Houston  
P.O. Box 1562  
Houston, Texas 77251-1562

OR96-1088

Dear Ms. Nguyen:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 40420.

The City of Houston (the "city") received a request for "copies of the proposals submitted by Fluor Daniel, Johnson Controls, and Landis-Gyr Powers in response to the referenced solicitation," TC-5-0769-025-009457, Facilities Management for the Southeast Command Station, Houston Police Department. The city raises no exception to the public disclosure of the requested information, but has informed the proposers of the request to enable them to raise any objections to the public release of the requested information. Since the property and privacy rights of the proposers may be implicated by the release of the requested information, this office also notified those proposers of this request. *See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances).*

Only one of the proposers responded to our notification, Johnson Controls, Inc. ("Johnson Controls"). Johnson Controls asserts that its proposal is excepted from required public disclosure based on sections 552.104 and 552.110 of the Government Code.

Section 552.104 states that:

Information is excepted from [required public disclosure] if it is information that, if released, would give advantage to a competitor or bidder.

The purpose of this exception is to protect the interests of a governmental body usually in competitive bidding situations. See Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *Id.* at 8-9. This exception protects information from public disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. See Open Records Decision No. 463 (1987). Consequently, a governmental body may waive section 552.104. See Open Records Decision No. 592 (1991) at 8. As the city has not asserted section 552.104, the city may not rely on that exception to withhold Johnson Control's proposal.

Section 552.110 excepts from disclosure two categories of information: (1) "[a] trade secret" and (2) "commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." Johnson Controls claims that its proposal is within the second category of section 552.110.

When applying the "commercial or financial information" branch of section 552.110, this office now follows the test for applying the correlative exemption in the Freedom of Information Act, 5 U.S.C. § 552(b)(4). See Open Records Decision No. 639 (1996). That test states that commercial or financial information is confidential if disclosure of the information is likely either (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. See *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). A business enterprise cannot succeed in a *National Parks & Conservation Ass'n* claim by a mere conclusory assertion of a possibility of commercial harm. To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. *Id.* (quoting *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985)).

Johnson Controls argues as follows:

In this case, disclosure of [our] proposal to a party outside the Government would cause substantial harm to [our] competitive position. The proposal contains proprietary and company confidential information about [our] technical and pricing approaches to performing facilities management contracts, including

but not limited to, the contract for which [we] submitted the proposal. Release of the information outside the Government would permit competitors, including but not limited to the requester, to obtain [our] proprietary and company confidential information, which in turn, would compromise certain competitive advantages that [we] possesses [sic]. [Our] competitors would be able to use the information contained in the proposal to understand our technical approaches to managing various facilities and [our] pricing approaches, including [our] labor rates and general and administrative rates.

We do not believe that Johnson Controls has established that it actually faces competition or that substantial competitive injury would likely result from disclosure of its proposal. Accordingly, we conclude that the city may not withhold the information from public disclosure based on section 552.110 of the Government Code. The city must also release the proposals of Fluor Daniel, Inc. and Landis & Gyr Powers, Inc., as those parties provided this office with no objections to their release.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo  
Assistant Attorney General  
Open Records Division

KHG/rho

Ref.: ID# 40420

Enclosures: Submitted documents

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Mr. Glen Wegworth  
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